IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO.52 OF 2006.

Shri. Hanumant R. Naik,
Major, residentof Bairo Alto,
Asagao, Bardez-Goa. ... Appellant.

Versus

Shri.Ajit Harmalkar,
Major, resident of Munang
Vado, Assagao, Bardez- Goa. ... Accused/Respondent

Mr. Melvin Viegas, Advocate for the applicant.
Mr. Arun Bras De Sa, Advocate for the respondent.

Coram :- **D. B. BHOSALE, J.**

Date : - 29 th November, 2007.

ORAL JUDGMENT :

1. This appeal by the complainant arises from the judgment and the order dated 3rd March, 2006 rendered by the Judicial Magistrate, First Class, in criminal case No.(O.A.)1767/S/2004/F filed by the appellant-complainant against the respondent-accused U/s.138 r/w. 142 of Negotiable Instrument Act by which the accused has been acquitted of the said offence.

2. Briefly stated, the case of the complainant is that, the accused had approached him for financial assistance to the extent of Rs.40,000/- in May 2004. The complainant paid him the said amount which the accused had agreed to repay within 4 months. The accused did not pay the said amount within four months as agreed. However, in discharge of his liability, he allegedly issued a cheque bearing

No.227299 dated 11.10.2004 for Rs.40,000/- drawn on Mhapusa Urban Co-operative Bank Ltd., Mhapusa, Goa. When the cheque was deposited by the complainant in his account in the Syndicate Bank, Mhapusa Branch, it was bounced and returned with the return memo dated 11.10.2004 with an endorsement "Not arranging the funds in the account". This fact was allegedly intimated to the accused with request to make the payment of the cheque amount. Since the accused failed to make the payment a notice dated 15.10.2004 was issued by the complainant calling upon the accused to make the payment within 15 days from the date of the receipt of this notice. Despite the notice, the accused, according to the complainant, failed to make the payment and hence, he filed the complaint along with all the relevant documents.

3. The defence propounded by the accused is that on 29th August, 2002 the complainant had requested him to supply laterite stones and had paid Rs.15,000/- as an advance. In turn, the accused as a security, gave a blank cheque to the complainant. According to the accused since the complainant did not make further payment for the laterite stones supplied by him to the complainant, he demanded the said amount to the complainant and to avoid the payment the complainant deposited the blank cheque duly filled by him in his Bank. The cheque was, however, bounced and a false complaint has been filed against him U/s.138 of the Act.

4. The trial Court has acquitted the accused holding that a blank cheque given by the accused to the complainant was not a cheque and therefore, the provisions of Section138 of the Act are not attracted. In support of his proposition, the trial Court relied upon the judgment of this Court in Shri. Ramdas Anant Naik Versus Jacob Fernandes,2006(1) Goa L.R. 75.

5. Mr. Viegas, learned Counsel for the appellant submitted that there was no reason for the accused to issue such cheque as a security, as claimed by the accused, for the supply of laterite stones to the appellant. In fact for that transaction, the complainant was liable to pay to the accused. He, then, after taking me through the evidence of the complainant, submitted that the loan transaction and the supply of the laterite stones were independent and they had no connection with each other. He submitted that laterite stones were supplied by the accused much before the issuance of the cheque and therefore, the defence propounded by the accused ought not to have been accepted by the Court below and acquitted him solely on the ground that the cheque was a blank cheque.

6. On the other hand, Mr. Bras De Sa, learned Counsel for the respondent submitted that a blank cheque is not a cheque within the meaning of Section 6 of the Act and therefore, the provisions of Section 138 of the Act are not attracted. He submitted that the trial court has rightly relied upon the judgment of this Court in Shri. Ramdas Anant Naik's case, where this Court after making a reference to the judgment of the Supreme Court has held that the blank cheque is not a cheque in the eye of law. He also relied upon the judgment of another learned Single Judge of this Court in M/s.Jain Irrigation Systems Ltd. Versus Arvind Irrigating Services, 2006(2) DCR, 602 Lastly, he submitted that the blank cheque was issued as a security of the contract.

7. I perused the complaint and the oral testimonies of the complainant and the accused. Even if it is assumed that issuance of the cheque and the supply of laterite stones are independent transaction and they have no connection with each other it is clear from the evidence of the complainant, as rightly observed by the Court below, that the

cheque issued by the accused was a blank cheque and except signature, according to the complainant, all the details of the cheque were filled by the complainant. At what stage, the cheque was filled, has not been stated by the complainant. However, it is clear from the evidence that the blank cheque was handed over to the complainant and all the details except the signature were filled by the complainant at later stage. This finding has not been disputed by the learned Counsel appearing for the appellant. In the circumstances, the Court below has rightly relied upon the judgment of this Court in Shri. Ramdas Anand Naik's case. The relevant observation in the said judgment reads thus :

> " The trial Court on the basis of the evidence on record has given a finding that a blank cheque was issued to the complainant after the evidence on record and has held that if a blank cheque is issued by any person and amount payable is not mentioned it doesnot constitute a cheque and, therefore, the penal provisions of Section 138 of the said Act are not attracted. The trial Court has relied on the judgments of the Supreme Court in support of the said finding. In my view, the finding recorded by the trial Court cannot be said to be perverse. The accused has changed his defence from time to time during the course of the trial. Yet once it is held that a blank cheque was given to the complainant there is no reason to interfere with the said finding of fact recorded by the trial Court particularly when the trial Court has given cogent reasons while arriving at the said conclusion. The submission made by the learned counsel appearing on behalf of the appellant, therefore, cannot be accepted and the judgment and order passed by the trial Court is, therefore, confirmed. The appeal is accordingly dismissed."

8. That apart,in view of the peculiar facts of this case, the complainant ought to have narrated the entire history of the transaction and the details of the transaction between him and the accused. He should have stated for what reason the amount of Rs.40,000/- paid to the accused in cash. In whose presence he paid this amount to the accused and if the amount was paid in cash why did he accept the blank cheque. There is absolutely no explanation about the transaction by the complainant in his evidence. As against this, the defence, as disclosed in the evidence of the accused, appears to be more probable and is sufficient to shift the burden as contemplated under section 139 of the Act. The findings recorded by the trial Court in any case cannot be said to be perverse. The conclusion arrived at by the trial Court accordingly stand confirmed. In the result, the appeal is dismissed.

D. B. BHOSALE, J.

SMA